FILED

MAR 22 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOWARD MILLER, Petitioner, v. COMMODITY FUTURES TRADING COMMISSION, Respondent.	No. 04-73914 CFTC No. 92-4 MEMORANDUM[*]

On Petition for Review of an Order of the
Commodity Futures Trading Commission

Argued and Submitted March 13, 2006
San Francisco, California

Before: REINHARDT, NOONAN, and HAWKINS, Circuit Judges.

Howard Miller petitions for review of an order of the Commodity Futures Trading Commission ("CFTC") imposing a $350,000 civil monetary penalty for fraudulent solicitation in violation of the Commodity Exchange Act. The penalty

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

was imposed on remand. *See Miller v. CFTC*, 197 F.3d 1227 (9th Cir. 1999) ("Miller I").

The CFTC's choice of sanction is reviewed for abuse of discretion. *Lawrence v. CFTC*, 759 F.2d 767, 774 (9th Cir. 1985). Every exercise of power by a federal agency must constitute "an act of reason grounded on the record before the agency." *Miller I*, 197 F.3d at 1236. While the agency must articulate a "rational connection between the facts found and the choice made," *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962), courts "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1984).

Here, the Commission's path may reasonably be discerned. The Commission first calculated the proved amount of loss to seven identified customers of Miller as a starting point for its analysis. The Commission then increased this amount in order to meet its goal of deterrence. *See Miller I*, 197 F.3d at 1236. It looked to the penalty it found necessary to deter similar conduct in a previous case. In *In re Gordon*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,326 (CFTC March 6, 1995) ("Gordon II"), the Commission imposed a $200,000 penalty after five customers testified to fraudulent solicitation over a period of 20 months.

The Commission then adjusted that amount to take into account the differences between the two cases and the effect of inflation on the deterrent effect of a given monetary penalty, finding that an increase was warranted because Miller's misconduct took place over a longer period, 50 months, and because inflation between 1995 and 2004 had "undermined the deterrent effect a $200,000 penalty would have on Miller."

The final amount of the penalty – $350,000 – does not relate to customers' losses according to any set formula. However, the choice of civil monetary penalties is an exercise of discretion, not the ministerial application of a formula to the facts. *Cf. Miller I*, 197 F.3d at 1236. Because the Commission's path can reasonably be discerned from its decision and that path rationally relates the facts found to the ultimate penalty decision, the choice of a $350,000 civil monetary penalty was not an abuse of discretion.

Miller's remaining arguments are barred by the law of the case doctrine, since they were resolved in *Miller I*. AFFIRMED.